(1) Supreme Court, U.S.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ZIYAD SHALASH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

John D. Cline
Counsel of Record
JONES DAY
555 California Street, 26th Floor
San Francisco, CA 94104
(415) 626-3939

QUESTIONS PRESENTED

1. Whether the Sixth Circuit's decision, upholding admission of irrelevant and inflammatory testimony about the ethnicity of an Arab-American defendant, his customers, and his associates, conflicts with the decisions of this Court and the other courts of appeals that seek to eradicate racial and ethnic prejudice from the criminal justice system?

2. Should the Court resolve a conflict in the circuits over the appropriate harmless error standard for a deliberate ignorance instruction that is not supported by the evidence?

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PETITION FOR A WRIT OF CERTIORARI

Ziyad Shalash petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-36) is unreported. The court's denial of rehearing and rehearing en banc (App. 42) is unreported. The opinion of the district court (App. 37-40) is unreported.[1]

JURISDICTION

The court of appeals entered judgment on August 11, 2004. App. 1. The court denied a timely petition for rehearing and for rehearing en banc on October 18, 2004. App. 42. This Court granted a sixty-day extension of time in which to file this petition, through March 17, 2005. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND FEDERAL RULES INVOLVED

U.S. Const. Amend. V provides in relevant part:

> [N]or shall any person . . . be deprived of life, liberty, or property without due process of law . . . .

[1] Citations to "App." are to the Appendix to this Petition. Citations to "JA" are to the Joint Appendix filed in the court of appeals.

Rule 403 of the Federal Rules of Evidence provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

Petitioner Ziyad Shalash and his brother Tareq are American citizens of Arabic ethnicity who, with their father, ran a family business in Lexington, Kentucky selling wholesale goods. On November 1, 2001, a grand jury in the Eastern District of Kentucky returned a superseding indictment charging the Shalash brothers with RICO, money laundering conspiracy, and other offenses relating to purchases of allegedly stolen property. JA89.

Trial began on August 27, 2002. The prosecution introduced evidence from witness after witness that the Shalashes and many of their customers and associates are of Arabic origin and sometimes speak Arabic. Defendants repeatedly objected to this evidence, which had no probative value, and the district court overruled the objections. JA351, 382-84, 624-25, 697.

In closing argument, the prosecution made a series of improper and prejudicial remarks, including claims that the charged offenses were "the tip of the iceberg," "only what we could prove," and "what we caught them doing; not what they did," and a suggestion that the jury should convict because of the time and resources the government had put into prosecuting the case. The district court denied

defendants' motions for mistrial and for a new trial based on these and other improper remarks. App. 40.

The government presented evidence of several transactions in which Ziyad participated that involved either stolen products or products represented to be stolen for purposes of 18 U.S.C. § 21. Ziyad defended primarily on the basis that he did not know or believe that the goods were stolen. Although the government presented sufficient evidence of Ziyad's knowledge to sustain the jury's verdict, it presented no evidence that he deliberately avoided learning the nature of the goods at issue. Over objection, JA1085-88, 1091-95, the district court gave a deliberate ignorance instruction, JA1189. No evidentiary basis existed for the instruction.

The jury found Ziyad guilty on all counts. The district court sentenced him to 57 months imprisonment and imposed a substantial forfeiture. Ziyad and Tareq (who was also found guilty on a number of counts) appealed to the United States Court of Appeals for the Sixth Circuit. They contended that the district court erred, among other respects, in admitting the evidence of Arab ethnicity, in giving the deliberate ignorance instruction over objection, and in denying the motion for mistrial based on the prosecution's improper closing argument.

On August 11, 2004, the Sixth Circuit affirmed. App. 1. As relevant here, the panel concluded that the admission of the Arab ethnicity testimony did not violate Fed. R. Evid. 403 or the due process clause, largely because, according to the panel, the government elicited the evidence for a proper purpose, or it did not prompt the testimony through its questions, or the testimony was not sufficiently egregious to warrant reversal. App. 4-12. The court held

that the "tip of the iceberg" comments were improper but did not require reversal. App. 12-17.

The panel rejected Ziyad's contention that the district court's deliberate ignorance instruction required reversal. Relying on *United States v. Mari*, 47 F.3d 782 (6th Cir. 1995), the panel concluded that even if the evidence was insufficient to support the deliberate ignorance instruction, the error in giving it was necessarily harmless because the jury would ignore the instruction. App. 19-20 (citing *Mari*, 47 F.3d at 785-86). The court denied panel rehearing and rehearing en banc. App. 42.

STATEMENT OF THE FACTS

During the years at issue, Tareq ran Unity Wholesale Grocers in Lexington, Kentucky. Ziyad ran United Trading Company, also in Lexington. Unity Wholesale dealt mostly in infant formula. United Trading primarily bought and sold health and beauty aids.

Unity Wholesale and United Trading were part of the diversion industry, also known as the secondary wholesale market. *See, e.g., United States v. Ebert*, 1999 U.S. App. LEXIS 8453 (4th Cir. May 3, 1999) (unpublished) (describing aspects of diversion industry). Diverters purchase product at below the manufacturer's wholesale price and resell it at a mark-up--representing the diverter's profit--but still below the wholesale price. Diverters obtain product in several ways, including through volume discounts, promotional discounts, resale in the United States of products originally intended for foreign markets, and from "collectors," who buy product in small quantities from retailers, such as Wal-Mart or Winn-Dixie, at promotional, below-wholesale prices.

On May 15, 2001, the government raided Unity Wholesale and United Trading and seized a substantial amount of money and property. The raid effectively put Unity Wholesale out of business and severely damaged United Trading, which closed following the trial.

REASONS FOR GRANTING THE WRIT

This case presents two issues of great importance to the administration of the criminal justice system.

First, the Court should grant the writ to determine the circumstances under which a defendant's ethnicity may properly be placed before the jury. The panel decision conflicts with decisions from this Court and other courts of appeals condemning government focus on a defendant's race or ethnicity absent some legitimate reason. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279, 309 (1987); *Rose v. Mitchell*, 443 U.S. 545, 555 (1979); *United States v. Cabrera*, 222 F.3d 590, 592-97 (9th Cir. 2000); *United States v. Vue*, 13 F.3d 1206, 1211-13 (8th Cir. 1994); *United States v. Cruz*, 981 F.2d 659, 663-64 (2d Cir. 1992); *United States v. Rodriguez Cortes*, 949 F.2d 532, 540-42 (1st Cir. 1991); *United States v. Doe*, 903 F.2d 16, 25 (D.C. Cir. 1990). The government had no legitimate reason to focus the jury's attention on the Arab ethnicity of the defendants and their customers and associates. The evidence served only to prejudice the defendants at a time when persons of Arab ethnicity are viewed with particular suspicion in this country.

Second, the Court should resolve the clear circuit split over the appropriate harmless error standard for a deliberate ignorance instruction that is not supported by the evidence. The Sixth Circuit and several other circuits treat such error as harmless per se. *See, e.g., United States v. Hanzlicek*, 187 F.3d 1228, 1235-36 (10th Cir. 1999); *United*

States v. Monus, 128 F.3d 376, 390-91 (6th Cir. 1997); *Mari*, 47 F.3d at 785-87; *United States v. Adenji*, 31 F.3d 58, 63-64 (2d Cir. 1994); *United States v. Stone*, 9 F.3d 934, 937-42 (11th Cir. 1993).[2] Other courts, however, have held that the error requires reversal of the defendant's conviction "unless it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty" even without the improper instruction. *United States v. Covington*, 133 F.3d 639, 645 (8th Cir. 1998); *see, e.g., United States v. Aguilar*, 80 F.3d 329, 333 (9th Cir. 1996); *United States v. Hilliard*, 31 F.3d 1509, 1517 (10th Cir. 1994); *United States v. Ojebode*, 957 F.2d 1218, 1228-29 (5th Cir. 1992). The Court should resolve the split to establish uniform treatment among the circuits for review of this error.

I. THE COURT SHOULD GRANT THE WRIT TO RESOLVE THE STANDARD FOR THE ADMISSION OF EVIDENCE CONCERNING A DEFENDANT'S RACE OR ETHNICITY.

Tareq and Ziyad Shalash are Arab-Americans. Their trial occurred in the weeks preceding the first anniversary of the September 11, 2001 attacks, in which Arab terrorists killed thousands of Americans. Each day of trial, newspapers and other media carried stories about the September 11 tragedy and its aftermath. Particularly under these circumstances, the defendants faced significant danger that anti-Arab prejudice would deny them a fair trial.

Over repeated objection, the prosecution exploited this potential prejudice by emphasizing the Arab ethnicity of the Shalash brothers--both of whom are American citizens--

[2] The Fourth Circuit has taken the same position in an unpublished decision. *United States v. Ebert*, 1999 U.S. App. LEXIS 8453, at *90-*98 (4th Cir. May 3, 1999); *see id.* at *93-*94 (describing circuit split).

and their customers. In its opening statement, the prosecution pointed to "the kinds of people that bring the goods in" as evidence that the goods were stolen. JA1017. It then elicited from witness after witness that many of the Unity Wholesale and United Trading customers were "Arab." JA385 (prosecution witness Al Cornette testifies that people bringing in cans "were all Arabic people from different nations"); JA403 (Cornette testifies that if Tareq did not pay his customers cash, "there was other Arabic people that would buy the product"); JA359 (prosecution witness Tim Clifton agrees with prosecution that "an Arabic person" taught him how to steal formula); JA444 (prosecutor asks whether it was "well known in the Arab community in Cincinnati among those who dealt in food products that Big Man was the place to sell milk"; hearsay objection sustained); JA351-52 (in response to prosecution question, "Did you tell Mr. Barnhart that persons of Arabic Middle Eastern descent deliver the majority of the razorblades to Pine Street," prosecution witness Kim Berryman responds, "There is Arabic people that bring stuff in"); JA616 (asked to describe the "[r]ace and dress and kind of cars they drive," prosecution witness Linda Rader describes United Trading customers as "Arabic men"); JA698 (prosecution witness Charlotte Harris testimony: "Q. What ethnic origin or nationality is Sam [Shalali]? A. He's an Arab. Q. He's Arab? A. Yes."); JA800-01 (Detective Cox testifies that, as of December 2000, the owner of a tobacco store at the address for Nashville Wholesale was a person of "Arab descent").[3]

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[3] The prosecution attempted to elicit similar testimony from Cathy Taylor, but Taylor could not identify a particular "nationality" for Unity Wholesale's customers who sought to cash checks at Community Trust Bank. JA989.

This testimony had no legitimate probative value; it served only to invite the jury to consider defendants' Arab ethnicity in reaching a verdict. "The references to ethnic background, in the trial context, could serve no purpose other than to influence the jury to resolve doubts against the defendant because he was a member of a foreign and, thereby, suspect people." *Commonwealth v. Lara*, 658 N.E.2d 692, 695 (Mass. App. 1995).

In other respects as well, the prosecution underscored the Arabic ethnicity of the defendants and their customers. For example, it elicited the following testimony from officer Daris Sneed, who participated in the joint federal-state investigation that led to the charges in this case:

> Q. Okay. Now, you were targeting what kinds of places?
>
> A. I went to little Mini-Marts, Mini-Mart stores, mainly Arabic-owned markets in different communities.

JA641. Similarly, the prosecution elicited irrelevant and prejudicial evidence about witnesses' discomfort when the defendants spoke Arabic in their presence. It obtained the following testimony from Cornette:

> Q. Okay. Now, when Mohammed, or Big Man, and Derrick [Tareq] talked to each other in your presence, how did they talk?
>
> A. It was always in Arabic.
>
> Q. Would you sometimes hear your name in their conversations?
>
> A. Yes.

> Q. How did that make you feel?
>
> A. Well, it always makes you feel uncomfortable. You know, it doesn't matter whether you're around Spanish-speaking people or what, when--you know, when you speak English and they know you don't speak any other--naturally it makes you uncomfortable when somebody is speaking.

JA388-89. And the prosecution elicited similar testimony from Memphis police detective Paul Sherman, who dealt with Tareq in an undercover role:

> Q. Okay. Now, if you'll go to page 29, right about in the middle of page 29 in the transcript, there's an un--it's got a "UM" for unintelligible male, something--or identified male, excuse me, and there's unintelligible, and then it says, "Speaking in Arabic." And then you say, "Man, you all got to teach me that. Scared the shit out of me, man."
>
> What was happening at that time that caused you to say that?
>
> A. They were talking in Arabic back and forth to each other, and I don't know Arabic. And when you're in there by yourself like that, you know, you don't know what they're talking about, if they're talking about, you know, doing something to you or what.

JA924-25; *see also* JA473 (prosecution elicits from witness that the owners of Allegheny Food Max spoke Arabic around her).

This Court has declared that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). Accordingly, the Court has "engaged in unceasing efforts to eradicate racial prejudice from our criminal justice system." *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987) (quotation omitted).

In accordance with these principles, the courts of appeals have repeatedly condemned the kind of irrelevant and prejudicial emphasis on ethnicity that occurred here. In *United States v. Cabrera*, 222 F.3d 590 (9th Cir. 2000), for example, the Ninth Circuit reversed a conviction where a prosecution witness injected evidence concerning the defendants' Cuban origin into the case. *See id.* at 592-97. The court found that the references to "Cubans" warranted reversal even though the defendants had not objected to the evidence--unlike this case, where defendants repeatedly objected--and had elicited some of the most damaging testimony themselves on cross-examination. Similarly, in *United States v. Vue*, 13 F.3d 1206 (8th Cir. 1994), the court reversed drug convictions because a prosecution witness discussed the involvement in drug smuggling of persons of Hmong descent. *See id.* at 1211-13. And in *Doe*, the court reversed drug convictions where a prosecution expert testified about the "Jamaican" influence on the District of Columbia drug trade and the prosecution emphasized that testimony in closing. *See* 903 F.2d at 18-29; *see also, e.g., United States v. Cruz*, 981 F.2d 659, 663-64 (2d Cir. 1992) (reversing conviction in part because prosecution witness referred to neighborhood where crime occurred as having "a very high Hispanic population," including "Dominicans"); *United States v. Rodriguez Cortes*, 949 F.2d 532, 540-42 (1st Cir. 1991) (reversing conviction because introduction of Colombian identification card prejudiced defendant).

The *Doe* court declared: "It is much too late in the day to treat lightly the risk that racial bias may influence a jury's verdict in a criminal case." 903 F.2d at 21. And the court refused to "quibble" with the government over whether the references to "Jamaicans" involved appeals to race; it found that "distinctions based upon ancestry are as odious and suspect as those predicated on race; in practical terms, appeals to either threaten the fairness of a trial." *Id.* at 21-22 (quotations and footnotes omitted).

The panel decision conflicts with these cases. If the evidence of ethnicity and national origin required reversal in *Cabrera*, *Doe*, and the other cited cases, the prosecution's pervasive focus here on "Arabs," in the weeks immediately preceding the September 11 anniversary, even more clearly requires a new trial, especially in light of the obviously improper "tip of the iceberg" argument.[4]

The panel echoes the government's purported rationales for the "Arab" evidence. It asserts, for example, that "in one instance the testimony helped to establish

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[4] The panel asserts that petitioner did not object to several aspects of the "Arab" testimony and thus that the "more daunting" plain error standard of review applies to the admission of that testimony. App. 4, 6, 7, 8, 9. The panel overlooks the critical point that petitioner objected repeatedly to this testimony *and obtained a continuing objection from the district court.* JA351, 382-84, 624-25, 697. A continuing objection, accepted by the district court, preserves the issue as to future evidence of the same kind. *See, e.g., United States v. Fortenberry*, 919 F.2d 923, 924 (5th Cir. 1990); *United States v. Ladd*, 885 F.2d 954, 958 (1st Cir. 1989); *United States v. Marshall*, 762 F.2d 419, 425 (5th Cir. 1985); *United States v. Vinson*, 606 F.2d 149, 153 (6th Cir. 1979).

identification." App. 5. But the testimony in question--Charlotte Harris' description of a Nashville broker involved in two of the allegedly stolen loads at issue in the indictment as an "Arab"--had absolutely no probative value. Harris readily identified the broker (Sam Shalali) from a photograph and a business card, JA719-20, 722-24; GX 42, 43, and his identity was never at issue in any event.

The panel concludes that the district court properly admitted the testimony from Cornette and Sherman that they felt uncomfortable or endangered when the defendants spoke Arabic in their presence because it suggested that the defendants were hiding something. App. 6-7. But there was no evidence that the defendants spoke Arabic to hide anything; their first language is Arabic, and no sinister inference can be drawn from the fact that they occasionally speak their native language. And even if there were some minimal probative value to the fact that defendants occasionally spoke Arabic in the presence of non-Arabic speakers, there was absolutely no such value--and considerable prejudice--from the Cornette and Sherman testimony that they felt uncomfortable (Cornette) or unsafe (Sherman) when defendants spoke Arabic in their presence.

The panel finds that the government "permissibly introduced ethnicity evidence on impeachment grounds" through its own witness, Kim Berryman. App. 6. But Berryman's testimony arose in response to the government's question about the appearance of the United Trading customers. In a pretrial statement to a government agent, she had described the United customers as persons of "Arabic Middle Eastern descent." JA351-52. When she did not provide this evidence at trial in response to a prosecution question, the prosecution "impeached" her with the prior statement. But the point of the so-called "impeachment" was to elicit irrelevant and prejudicial evidence--the Arabic

origin of United customers--rather than to address a relevant point in the case. The government cannot use contrived "impeachment" of its own witness to inject inadmissible evidence of ethnicity into the case.

The panel excuses some of the "Arab" testimony on the ground that the prosecution did not "prompt" it. App. 5. But evidence of ethnicity is no less prejudicial merely because the prosecution does not deliberately elicit it. Moreover, two of the three examples the panel cites--the testimony of Daris Sneed and Charles Cox--involved law enforcement officers who were part of the prosecution team. Even if they volunteered the "Arab" testimony, their conduct must be imputed to the government.

The panel notes that, given the Arabic names and language of the defendants and some witnesses, "[e]ven the most mildly-attentive juror could not have sat through this eight-day trial without realizing that it involved defendants and many witnesses of Arab descent." App. 9. But the same can be said of *Cabrera*, *Doe*, and any other case in which the prosecution refers to the ethnicity of the defendant. The defendant's race or ethnicity will often be apparent. Courts control jurors' innate prejudices toward defendants of different backgrounds through careful voir dire and clear instructions. What is forbidden--and what happened here--is for the government to call attention to the defendant's race or ethnicity without a legitimate purpose. Where the testimony has no other probative value, it necessarily suggests to the jury that it should consider the defendant's race or ethnicity in reaching its verdict. The fact that the government does not explicitly argue that the jury should draw such an inference--a point the panel stresses, App. 10-11--does not reduce the prejudice from the evidence.

The panel decision conflicts with the cited decisions from other courts of appeals. It accepts uncritically the government's purported justifications for the "Arab" testimony and ignores the cumulative effect of the government's repeated references to the defendants' "Arab" ethnicity shortly before the September 11 anniversary. It invites the government in future cases to engage in similar tactics. And it fails to honor the principle that "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice." *Rose*, 443 U.S. at 555. The Court should grant the writ and reverse petitioner's conviction.

II. THE COURT SHOULD GRANT THE WRIT TO RESOLVE THE CIRCUIT SPLIT OVER THE PROPER HARMLESS ERROR STANDARD FOR AN ERRONEOUS DELIBERATE IGNORANCE INSTRUCTION.

The panel, following Sixth Circuit precedent, held that a district court's error in giving a deliberate ignorance instruction without evidentiary support is harmless as a matter of law, regardless of the circumstances of the particular case. App. 19-20; *see, e.g., United States v. Monus*, 128 F.3d 376, 390-91 (6th Cir. 1997); *Mari*, 47 F.3d at 785-87. Several circuits have adopted the same harmless per se approach. *See, e.g., United States v. Hanzlicek*, 187 F.3d 1228, 1235-36 (10th Cir. 1999); *United States v. Adenji*, 31 F.3d 58, 63-64 (2d Cir. 1994); *United States v. Stone*, 9 F.3d 934, 937-42 (11th Cir. 1993). Other courts, however, have held that the error requires reversal of the defendant's conviction "unless it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty" even without the improper instruction. *United States v. Covington*, 133 F.3d 639, 645 (8th Cir. 1998); *see, e.g., United States v. Aguilar*, 80 F.3d 329, 333 (9th Cir. 1996);

United States v. Hilliard, 31 F.3d 1509, 1517 (10th Cir. 1994); *United States v. Ojebode*, 957 F.2d 1218, 1228-29 (5th Cir. 1992). The Court should grant the writ to resolve this clear circuit split.

A deliberate ignorance charge "instructs the jury that it can infer knowledge by the defendant of a particular fact if the defendant intentionally decides to avoid knowledge of that fact." *Adeniji*, 31 F.3d at 62. Courts have long recognized that a deliberate ignorance instruction presents two significant dangers. First, the instruction may "cause a jury to convict on the basis of negligence." *Mari*, 47 F.3d at 785; *see, e.g., United States v. Barnhart*, 979 F.2d 647, 651-52 (8th Cir. 1992); *United States v. Giovannetti*, 919 F.2d 1223, 1228 (7th Cir. 1991). Second, the instruction might shift the burden to the defendant to prove his innocence. "The effect of a [deliberate ignorance] instruction in a case in which no facts point to deliberate ignorance may be to create a presumption of guilt." *United States v. Murrieta-Bejarano*, 552 F.2d 1323, 1325 (9th Cir. 1977); *see, e.g., United States v. Francisco-Lopez*, 939 F.2d 1405, 1411 (10th Cir. 1991).

In light of these dangers, courts have imposed strict limits on the use of the deliberate ignorance instruction. As a threshold matter, courts allow the instruction only in those "comparatively rare cases" where the evidence "point[s] in the direction of deliberate ignorance." *United States v. Sanchez-Robles*, 927 F.2d 1070, 1073 (9th Cir. 1991) (quotation omitted); *see, e.g., Mari*, 47 F.3d at 787 (admonishing district courts "against giving the deliberate ignorance instruction indiscriminately"). "Where the evidence relative to knowledge shows that the defendant had actual knowledge of the facts in question, or where the only evidence relative to knowledge shows that the defendant did not have actual knowledge and there is no evidence that the defendant made some deliberate effort to avoid obtaining

actual knowledge, an instruction on deliberate ignorance is not appropriate." *United States v. Abner*, 35 F.3d 251, 255 (6th Cir. 1994); *see, e.g., United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990).

Under these standards, the district court erred in giving the deliberate ignorance instruction. The prosecution produced no evidence that Ziyad consciously avoided knowledge that the goods at issue were stolen. No evidence shows, for example, that Ziyad instructed sellers not to tell him where they obtained their goods, or that he asked United Trading's employees to handle particular transactions or deal with particular customers so that he could avoid gaining knowledge and maintain "plausible deniability." Because "there is no evidence that [Ziyad] made some deliberate effort to avoid obtaining actual knowledge," the deliberate ignorance instruction was "not appropriate." *Abner*, 35 F.3d at 255; *see Mari*, 47 F.3d at 787.

Under *Covington* and similar cases, the district court's error in giving the unsupported deliberate ignorance instruction would require reversal. The prosecution repeatedly emphasized that instruction in its opening statement (JA1014, 1020-21) and in its closing argument (JA1112-15, 1117-18, 1123). It plainly is not "clear beyond a reasonable doubt" that the jury would have found Ziyad guilty even without the improper instruction. *Covington*, 133 F.3d at 645. If Ziyad had been convicted in the Fifth, Eighth, or Ninth Circuits, therefore, he would be entitled to reversal and a new trial. Under the harmless per se approach followed in the Sixth Circuit, on the other hand, his conviction was automatically affirmed despite the error. The Second, Fourth, and Eleventh Circuits, and at least some panels of the Tenth Circuit, would follow the same approach.

The Court should grant the writ and reject the harmless per se approach. If the giving of a deliberate ignorance instruction without adequate evidentiary support is always harmless, the prosecution will have a powerful incentive to request the instruction in every case where knowledge is an issue, and the district court will have little incentive not to acquiesce. The Sixth Circuit itself has recognized that a deliberate ignorance instruction may "cause a jury to convict on the basis of negligence," and it has admonished district courts "against giving the deliberate ignorance instruction indiscriminately." *Mari*, 47 F.3d at 785, 787. Ironically, the *Mari* harmless per se rule encourages precisely the "indiscriminate" use of the deliberate ignorance instruction that the case condemns. This Court should discard the *Mari* rule and confine the deliberate ignorance instruction to the rare case where the facts warrant it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN D. CLINE
Counsel of Record
Jones Day
555 California St., 26th Floor
San Francisco, CA 94104
(415) 626-3939

March 2005

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 03-5037, 03-5038, 03-5210, 03-5211

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY
v.	)	
TAREQ SHALASH,	)	
Defendant-Appellant,	)	
ZIYAD SHALASH,	)	(Filed Aug. 11, 2004)
Defendant-Appellant.	)	

Before SUHRHEINRICH, GIBBONS and SUTTON, Circuit Judges.

SUTTON, Circuit Judge. A jury convicted Tareq Shalash and his brother, Ziyad, of numerous criminal counts stemming from their operation of a family business that served as a fence for stolen goods. On appeal, the Shalashes argue that: (1) the district court erroneously admitted evidence related to their race and ethnicity; (2) the Government engaged in prosecutorial misconduct during the closing argument; (3) the district court erred in instructing the jury on deliberate ignorance; and (4) the Government offered insufficient evidence to convict. As none of these challenges rises to the level of reversible error, we affirm.

I.

The Shalash brothers, along with their father "Big Man," operate Unity Wholesale Grocers and United Trading Company, which are located in Lexington, Kentucky. The two companies buy consumer goods from a variety of sources, repackage them and sell them to retailers – what is otherwise known as the "diverting" business.

At some point the Shalashes began buying and selling stolen goods through these companies. Law enforcement officials in Kentucky, Ohio and Tennessee determined that the Shalashes acquired the stolen goods in a number of ways: they bought them from local shoplifters; they bought them from a woman (Misty Washabaugh) who ran an interstate shoplifting ring; they purchased stolen trailers that were full of consumer goods; and they bought one item – stolen infant formula – from small, independent operations in Cincinnati and Columbus, Ohio.

On November 1, 2001, a federal grand jury returned a 27-count superseding indictment against the Shalashes. The indictment charged the brothers with two violations of the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. § 1961 *et seq.* And it charged them individually with a multitude of other offenses: (1) transporting stolen goods in interstate commerce, 18 U.S.C. § 2314; (2) receiving stolen goods that moved in interstate commerce, *id.* § 2315; (3) receiving goods stolen from a shipment in interstate commerce, *id.* § 659; (4) conspiring to commit several of these offenses, *id.* § 371; and (5) conspiring to commit money laundering, *id.* § 1956(h). The indictment also charged Big Man, but he died before trial.

After an eight-day trial, from August 27 to September 6, 2002, the jury returned a guilty verdict on most counts, including the RICO violations, several counts of dealing in stolen property and the money-laundering conspiracy charge. The Shalashes moved for a judgment of acquittal or a new trial. They argued that (1) they received an unfair trial due to references to their ethnicity during the trial (particularly in view of the proximity between the date of their trial and the one-year anniversary of September 11, 2001), (2) the Government's closing argument amounted to prosecutorial misconduct, and (3) the evidence did not support the verdict.

The district court denied the Shalashes' motion. The court observed that it "was particularly vigilant during the trial to guard against any inappropriate references that could tie the defendants to any anti-middle eastern sentiment." D. Ct. Op. at 3. The Arab references, moreover, were "proper for identification purposes," and "the evidence indicating that the defendants spoke in Arabic at times was relevant to show an intent to hide their business dealings." *Id.* The Government's closing argument did not require a new trial, the court concluded, because the reference to wealth related to "the wrongful nature of ill-gotten gains" and reminded the jury that they "had the opportunity and responsibility to take action," while the reference to other crimes "referred to the pattern of ongoing activity indicative of the RICO prosecution." *Id.* at 3-4. Lastly, the court concluded, the evidence supported the verdict. The district court sentenced Tareq Shalash to thirteen 78-month prison terms and one 60-month prison term, all to be served concurrently. And Ziyad Shalash received eight 57-month prison terms, all to be served concurrently.

II.

The Shalashes first challenge the admission of testimony related to their ethnicity and to the ethnicity of other individuals involved in the operation under Rule 403 of the Federal Rules of Evidence. Rule 403 permits a district court to exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." When a party makes a timely Rule 403 objection, we review the district court's ruling for an abuse of discretion. *United States v. Sanders,* 95 F.3d 449, 453 (6th Cir. 1996). Otherwise, the more daunting plain-error standard applies. *See United States v. Camejo,* 333 F.3d 669, 672 (6th Cir. 2003) ("Plain error is defined as an egregious error, one that directly leads to a miscarriage of justice.") (quotation omitted).

When faced with a Rule 403 challenge to evidence relating to ethnicity and race, courts consider how the evidence was used and the context in which it was introduced. If the evidence is relevant to the case and the party does not use the evidence impermissibly (*e.g.,* by trying to show that the individual's ethnicity is somehow indicative of guilt or by trying to arouse xenophobic fears), the admission of the evidence generally will not run afoul of Rule 403. *Compare United States v. Jankowski,* 194 F.3d 878, 881-82 (8th Cir. 1999) (evidence of foreign language use was probative of an attempt to conceal communications and "was not linked with any argument or evidence that [the defendant] was more likely to have committed the crime because of her national origin"); *United States v. Black,* 88 F.3d 678, 681 (8th Cir. 1996) (no error occurred in allowing a witness to identify the defendant as "the Jamaican" because the record supported that it was the defendant's nickname, and "none of the statements referring to

[the defendant] as 'the Jamaican' were used in a prejudicial manner"); *United States v. Khan,* 787 F.2d 28, 34 (2d Cir. 1986) (evidence that Pakistanis dressed similarly regardless of wealth did not "subliminally appeal[ ] to guilt by association and [ ] to prejudice against foreigners" when properly used to rebut defense contention that defendant's dress showed he was too poor to be a major drug dealer); *United States v. Scott,* No. 92-6435, 1993 WL 280323, at *5 (6th Cir. July 26, 1993) (no error in admitting photos suggesting interracial sexual activity when "[t]he interracial nature of this case was evident when witnesses testified, and the photos simply constituted more evidence of the relationships among the individuals involved"), *with United States v. Rodriguez Cortes,* 949 F.2d 532, 540-42 (1st Cir. 1991) (reversing conviction where district court admitted defendant's Colombian identification card and the Government argued that because the defendant was a Colombian, he must have ties to Colombian drug dealers).

In this case, the 12 references to ethnicity challenged by the defendants do not rise to the level of reversible error. In one instance, the testimony helped to establish identification. Charlotte Harris knew the man who brokered stolen trailers for the Shalashes only as "Sam," then described him as an "Arab" man. JA 698. The Government later proved that "Sam" was Sam Shalali, an Arab man who had sold stolen trailers to Tareq. The district court did not abuse its discretion in rejecting the defendants' objection to this identification evidence.

In other instances, the testimony was not prompted by questions from the Government but came in through otherwise probative testimony. Charles Cox, who investigated Shalali, said at trial that he could not pronounce Shalali's name, then added that it was of "Arab descent."

JA 801. Prosecutors asked Alfred Cornette, a manager for the Shalashes, if the people selling goods to the Shalashes "want[ed] cash." JA 403. Cornette responded that "[t]hey pretty much demanded it . . . there [were] other Arabic people that would [otherwise] buy the product." *Id.* Prosecutors asked Officer Daris Sneed "what kinds of places" he was investigating, and Sneed responded: "I went to little Mini-Marts, Mini-Mart stores, mainly Arab[ ]-owned markets in different communities." JA 641. The prosecutors did not directly solicit any of this testimony, and the defense did not object to any of it on Rule 403 grounds. The admission of these innocuous references to ethnicity does not rise to the level of plain error.

In another instance, the Government permissibly introduced ethnicity evidence on impeachment grounds. When Kim Berryman, a Shalash employee, told prosecutors that she could not remember who delivered razors to the Shalashes, prosecutors asked: "Did you tell [the police] that persons of Arab[ ] Middle Eastern descent deliver the majority of the razorblades?" JA 351. She responded: "Yeah, I think I did." JA 352. The court did not abuse its discretion in permitting this question over the defendants' objection because it allowed the Government to impeach a witness with regard to her *own* statement and to challenge her claim that she did not recall these vendors.

In another instance, the court admitted testimony relating to the Shalashes' frequent conversations in Arabic. Cornette testified that the Shalashes frequently spoke Arabic in his presence, and he often heard his name but never knew the subject of the conversation, which made him "uncomfortable." JA 388-89. In admitting this testimony over the defendants' objection, the district court did not abuse its discretion because the most natural

understanding of Cornette's discomfort stems not from a general antipathy toward Arabic-speaking individuals but from the notable fact that he worked at the United Trading Company and could not understand what they were saying and in particular could not understand what they were saying about *him*.

Officer Paul Sherman, who delivered trailers to Tareq, also testified that the Shalashes spoke Arabic in his presence. An undercover police officer, Sherman testified that "when you're in there by yourself like that, . . . you don't know what they're talking about, if they're talking about, . . . doing something to you or what." JA 925. Like Cornette's testimony, Sherman's testimony does not naturally prompt xenophobic fears; it more naturally reveals a concern that the Shalashes were hiding something from him. Unlike Cornette's testimony, the Shalashes failed to object to Sherman's testimony; its admission was not plainly erroneous.

Other testimony seems to have had little probative value either because the testimony was vague or because the offending question was never answered. Prosecutors asked Timothy Clifton, a shoplifter who dealt with the Shalashes, if the man who taught him to steal was "an Arabic person," and Clifton responded "yes." JA 359. Prosecutors asked Cathy Taylor, a local bank employee, if the vendors coming to the bank to cash checks from the Shalashes had "any particular nationality," but she could not remember. JA 989. Defendants did not object to these isolated questions, and in neither instance did the question (or answer) amount to an "egregious error [] that directly [led] to a miscarriage of justice." *Camejo,* 333 F.3d at 672.

Prosecutors asked Linda Khriss, who purchased goods from the Shalashes, if it was "known in the Arab community, especially those dealing in the stores in Cincinnati, that a place to sell milk was Big Man in Lexington?" JA 444. Defense counsel objected on hearsay grounds, not Rule 403 grounds, and the district court sustained the objection. The asking of the question by itself did not amount to plain error.

The Shalashes finally challenge two other statements. Prosecutors asked Cornette "what the people that were bringing the loose cans [of baby formula] in looked like generally." JA 385. Cornette responded "[T]hey were all Arabic people from different nations." *Id.* In overruling the Shalashes' objection, the district court said: "I think he's entitled to say what he saw, and I don't see that this [was] unduly prejudicial." JA 384. Along the same lines, prosecutors asked Linda Rader, another Shalash employee, for the "[r]ace and dress" of those selling goods to the Shalashes. JA 616. Rader said, "[i]t would be Arab[ ] men." *Id.* After the Government asked several more questions, defense counsel finally objected, and the court overruled, saying "I think that is relevant. . . . There's no racial animus here, it's just what she says happened." JA 624.

While it is difficult to see the Government's need for this testimony, its appearance in an eight-day trial does not prompt a "definite and firm conviction that the trial court committed a clear error of judgment" by admitting this testimony. *Trepel v. Roadway Express, Inc.*, 194 F.3d 708, 716 (6th Cir. 1999). As the district court observed, the witnesses related only their personal observations, and the prosecutor did not pursue these matters further.

In concluding that these 12 pieces of testimony did not rise to the level of plain error in some instances or to an abuse of discretion in other instances, two other points deserve comment. First, this criminal case involved three defendants (at least initially), all with Arab names, all from the same Arab family, all of Arab descent and all Arabic speaking, and many witnesses of Arab descent and with Arab names. Some of the most incriminating evidence obtained by the Government involved tape-recorded conversations of the defendants and others speaking in Arabic, which required English translations for the jury. Even the most mildly-attentive juror could not have sat through this eight-day trial without realizing that it involved defendants and many witnesses of Arab descent. Whether before 9/11, after 9/11 or near the one-year anniversary of 9/11, the names, language and appearance of the defendants could not have been obscured from the jury.

Second, the defendants themselves introduced similar evidence. Defense counsel asked Linda Khriss, an Arab woman who cooperated with the Government, if Big Man "was the head of the family and in charge of the business." JA 471. The witness said "being Arab, always the father is in charge of everything," to which the Shalashes' attorney replied: "Thank you. That's a very good point. Thank you." *Id.* During summation, the defense quoted this testimony and argued that Ziyad acted only at the direction of his father. The defense also challenged Khriss about her choice of Arabic words when she told several Shalash associates that she received her goods from a "harami" or thief. Invoking this testimony, the Shalashes argued that "harami" was an uncommon Arabic word for thief and that

the Shalash associates may have misunderstood her when she explained that her goods were stolen.

As the common-sense realities of this case suggest and as the evidence introduced through defendants' own counsel confirms, no one could have tried this case without introducing some evidence concerning the ethnic origin of the defendants and many witnesses, and no jury could have heard this case without appreciating the ethnic origin of many individuals in the case. The question under these circumstances is not whether ethnicity was mentioned; it is whether the Government tried to connect ethnicity with criminal propensities. In our view, it did not. Like the district court, we believe that the challenged testimony was probative in some instances, unprompted by the Government in other instances, and insufficiently prejudicial in still other instances. Whether the challenged testimony is viewed individually or for its cumulative effect, these references to ethnicity it did not create an "undue tendency to suggest a decision based on improper considerations." *United States v. Bilderbeck,* 163 F.3d 971, 978 (6th Cir. 1999).

Acknowledging that it would have been impossible to conceal the ethnicity of the defendants and many witnesses entirely, the defendants persist that the Government had a duty to be particularly vigilant in this case (in view of the one-year anniversary of 9/11) and that the Government's conduct crossed the line between permissible and impermissible references to race established by several cited cases. While we agree with the defendants that the Government – and the district court as well – needed to be exceedingly mindful and watchful of these concerns, the references to ethnicity in this trial did not cross any prohibitory line. The cases cited by the Shalashes share a

common element missing here: Namely, they involved a Government lawyer questioning a law enforcement official, sometimes as an expert, about the criminal practices of an ethnic community for the purpose of establishing a *modus operandi* based on race. *See United States v. Doe,* 903 F.2d 16, 19-23 (D.C. Cir. 1990); *see also United States v. Cabrera,* 222 F.3d 590, 594-97 (9th Cir. 2000); *United States v. Vue,* 13 F.3d 1206, 1211-13 (8th Cir. 1994); *United States v. Cruz,* 981 F.2d 659, 662-64 (2d Cir. 1992). While the Government in this case occasionally asked witnesses to identify the race of an individual,[1] it did not call a witness for the purpose of establishing a *modus operandi* common to Arab-fencing operations or some other criminal propensity.

Nor, more specifically, does *United States v. Rodriguez Cortes,* 949 F.2d 532 (1st Cir. 1991), advance the Shalashes' argument. There, the Government introduced an identification card to show that "it was more likely than not that the defendant, as a Colombian, would know about the conspiracy and be entrusted [by his fellow Colombians] as a courier." *Id.* at 541. In closing, the Government argued that the defendant was a conspirator because he was a Colombian. *Id.* ("[T]his young man has ties with Colombia, from there you can reasonably infer why [a Colombian dealer] was calling him his friend."). In this instance, the Government simply did not make a comparable argument to the jury, which places this case on the permissible side of the ethnic-references line. *See United States v. James,* 30 F.3d 84, 85 (8th Cir. 1994) (references to nationality did not imply "a connection . . . [to] the likelihood of involvement in the drug trade[, which] distinguishes this case from others where references to ethnic origin were tied to implications of likelihood of

involvement in criminal activity because of that ethnic origin"); *see also United States v. Blackwood,* 913 F.2d 139, 143 (4th Cir. 1990) (defendant's Jamaican passport did not "excite xenophobic hostility" when the Government introduced the passport "for the purpose asserted," namely that the defendant exercised control over the room where the passport was found).

III.

The Shalashes next challenge the fairness of their trial based on their objections to the Government's closing argument – not because the argument referred to the ethnicity of the defendants but because it was otherwise improper. Although we agree with the Shalashes that the Government should have known better with respect to some portions of its closing argument, the misconduct was sufficiently isolated that it does not require a new trial.

In reviewing allegations of prosecutorial misconduct, we initially ask whether the prosecutor's comments were improper. *See United States v. Galloway,* 316 F.3d 624, 632 (6th Cir. 2003). If so, we ask whether the comments were flagrant and warrant reversal by considering: "(1) whether the statements tended to mislead the jury and prejudice the defendant; (2) whether the statements were isolated or pervasive; (3) whether the statements were deliberately placed before the jury; and (4) whether the evidence against the accused is otherwise strong." *Id.* Even if the comments were not flagrant, a new trial is called for if: "(1) the other evidence is not overwhelming; (2) [the defendant] objected at trial; and (3) there was no curative admonishment by the judge." *Id.* at 633.

Several of the challenged statements were not improper and thus do not clear the first hurdle for obtaining a new trial. The references to the Shalashes "getting rich" and having "extra money" permissibly highlighted their illegally-obtained wealth and their abuse of corporate power in running a racketeer-influenced company. *Cf. United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940) ("[I]t is not improper in a Sherman Act case to discuss corporate power, its use and abuse, so long as those statements are relevant to the issues at hand. For that subject is material to the philosophy of that Act."); *Henderson v. United States*, 218 F.2d 14, 19 (6th Cir. 1955) ("Where the nature of the offense charged reasonably includes a consideration of the economic status of the injured persons . . . a defendant has no just cause to complain if their status is disclosed and commented upon in presenting the case to the jury."). Far from arguing that the Shalashes should be convicted because they were wealthy, *see Sizemore v. Fletcher*, 921 F.2d 667, 671 (6th Cir. 1990) (prosecutor improperly "suggested to the jury that the defendant could afford to buy justice in court through the use of expensive exhibits and multiple defense attorneys"), the prosecution argued that they had become wealthy because of their criminal activity.

The Government also permissibly reminded the jury of their role in the judicial system, that the decision to convict lay in their hands. "We can investigate," the prosecutor argued, "we can prosecute . . . till the cows come home, but if you don't do it, it doesn't get done. I repeat, it's time for them to go." Similar arguments, we have held, do not require a new trial. *See United States v. Alloway*, 397 F.2d 105, 113 (6th Cir. 1968) ("You the jurors, are called upon in this case to be the world conscience of

the community. And I'm calling on this jury to speak out for the community and let the John Alloways know that this type of conduct will not be tolerated, that we're not going to tolerate [it]."); *Henderson,* 218 F.2d at 19 ("Unless calculated to inflame the minds of the jurors, an appeal to the civic responsibilities of jurors as law-abiding citizens is not misconduct."). Unlike the cases cited by the Shalashes, where the prosecutors improperly suggested "that unless this defendant is convicted it will be impossible to maintain 'law and order' in the jurors' community," *United States v. Barker,* 553 F.2d 1013, 1025 (6th Cir. 1977); *see United States v. Solivan,* 937 F.2d 1146, 1154 (6th Cir. 1991), the prosecutor here emphasized only that the Government could not convict the Shalashes without a guilty verdict.

The same cannot be said of two other arguments made by the prosecutor. In one of them, the prosecutor argued:

> [Y]ou know, because of the pattern and the continuity established here, that it was going on long before that, and you know instinctively that we didn't catch everything they did. This, ladies and gentlemen, is the tip of the iceberg. This is one little window into that Shalash enterprise. This is only what we could prove. Law enforcement knew this was going on, and they proved it was going on, and it's time for them to go.

JA 1111. During rebuttal, the Government continued, "[W]hat I'm trying to tell you is that we just have here a small cross-section of what they really did. This is what we caught them doing; not what they did." JA 1128. "[T]ip of the iceberg" arguments, we have held, impermissibly encourage convictions based on crimes that the Government made no attempt to prove, much less ever charged.

See Snipes v. United States, 230 F.2d 165, 166 (6th Cir. 1956) (prosecutor's argument that "[w]e could have made thirty or forty counts in this thing" was improper and prejudicial because "[t]here was no basis in the evidence for this assertion").

In the other argument, the prosecutor said:

> [F]or the last couple of years, . . . the Ohio Task Force and the Memphis Task Force and the Lexington FBI put[ ] this altogether [sic], interviewing the witnesses, spending countless hours and hundreds of thousands of dollars investigating this. And . . . the United States Attorney's Office put [ ] together this case, long hours, long investigations, research, and money.

JA 1125-26. The considerable resources spent on a trial (and investigation) no more prove the guilt of the defendant than they do the potential inefficiency or incompetence of the Government. The argument has no place in a criminal trial. *See United States v. Bess,* 593 F.2d 749, 754 (6th Cir. 1979) ("[I]t is always improper for a prosecutor to suggest that a defendant is guilty merely because he is being prosecuted."); *see also United States v. LaMorte,* 950 F.2d 80, 83 (2d Cir. 1991) ("The prosecutor's statement that '[y]ou don't think the government is busy enough prosecuting crimes that it has the time to be prosecuting innocent people, going after people arbitrarily?' was improper.").

Improper though these two statements were, they do not require a new trial when gauged by the factors outlined in *Galloway,* 316 F.3d at 632. The first factor (the tendency to mislead the jury and prejudice the accused) does not support a new trial. A reading of the transcript

shows that the evidence properly admitted at trial dominated the Government's closing argument. The prosecutor's reference to the resources spent on the prosecution, though inappropriate, merely reinforced what was self-evident from the record: The Government devoted considerable resources, including law enforcement officials from three States, to investigating the Shalashes. And the Government did not make its "tip of the iceberg" comment in isolation but as a way of emphasizing the ongoing nature of the corrupt enterprise and its pattern of criminal behavior. Any remaining risk of prejudice to the defendants from these remarks was diminished by the district court's instruction that the jury should consider only evidence presented against the Shalashes, not unproven crimes or facts outside of the record.

The second factor (whether the statements were isolated or pervasive) and the third factor (whether the statements were deliberately placed before the jury) do not support a new trial. The two remarks were isolated, and there is no indication that they stemmed from a deliberate plan to inflame the jury as opposed to unduly-zealous advocacy.

The fourth factor (the strength of the evidence) also shows that the defendants did not receive an unfair trial. The Government produced extensive evidence in support of the 22 convictions, many of which the defendants do not challenge on sufficiency grounds. All four factors considered, the prosecutor's remarks were not flagrant under the *Galloway* test.

Even when the prosecution's conduct is not flagrant under the four *Galloway* factors, we still may insist on a new trial if the evidence in favor of conviction is close. *See*

Galloway, 316 F.3d at 633. That is not the case here, however. Considerable evidence favored the convictions, and the district court's curative instruction made sure that any risk of prejudice from the closing argument was minimal.

IV.

The defendants next argue that the district court erred in giving a deliberate-ignorance instruction to the jury. After describing the elements of the various crimes charged in the indictment, the district court explained:

> No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that a particular defendant deliberately ignored a high probability that the property he was purchasing was stolen, then you may find that he knew that it was stolen. But to find this, you must be convinced beyond a reasonable doubt that the particular defendant was aware of a high probability that the property was stolen, and that the defendant deliberately closed his eyes to what was obvious. Carelessness or negligence or foolishness on his part is not the same as knowledge and is not enough to convict. This, of course, is all for you to decide.

JA 1188-89. Applying an abuse-of-discretion standard, we review the district court's choice of jury instructions "to determine whether they fairly and adequately inform the jury of relevant considerations and explain the applicable law to assist the jury in reaching its decision." *United States v. Prince,* 214 F.3d 740, 760 (6th Cir. 2000).

The district court did not commit reversible error in giving this instruction. All of the stolen-property crimes

required the Government to show that the Shalashes knew that the relevant goods were stolen. *See* 18 U.S.C. § 659 ("knowing the [goods] to have been embezzled or stolen"); *id.* § 2314 ("knowing the [goods] to have been stolen"); *id.* at § 2315 (same). And the instruction follows the Pattern Criminal Jury Instructions for the Sixth Circuit § 2.09 (1991), which accurately states Sixth Circuit law with respect to this issue. *United States v. Mari,* 47 F.3d 782, 785 (6th Cir. 1995).

Nor did the Government's use of a deliberate-ignorance instruction in connection with 18 U.S.C. § 21 alter this conclusion. That section provides:

> (a) Wherever in this title it is an element of an offense that –
>
> (1) any property was embezzled, robbed, stolen, converted, taken, altered, counterfeited, falsely made, forged, or obliterated; and
>
> (2) the defendant knew that the property was of such character; such element may be established by proof that the defendant, after or as a result of an official representation as to the nature of the property, believed the property to be embezzled, robbed, stolen, converted, taken, altered, counterfeited, falsely made, forged, or obliterated.
>
> (b) For purposes of this section, the term "official representation" means any representation made by a Federal law enforcement officer . . . or by another person at the direction or with the approval of such an officer.

This statute allows law enforcement officials to conduct sting operations by representing goods as stolen and proving the defendants believed the representation.

The Shalashes argue that deliberate ignorance applies just to "knowledge" offenses, not to "belief" under 18 U.S.C. § 21. Analogizing "belief" to the "intent" required for a conspiracy conviction, the Shalashes invoke *United States v. Mankani,* 738 F.2d 538 (2d Cir. 1984), which says that deliberate ignorance may never support a finding of "intent." *Id.* at 547 n.1 ("If someone can consciously avoid learning of the activities and objects of a conspiracy, how can that person ever intend those events to take place?"). For similar reasons, the defendants urge, they could not form a "belief" concerning the stolen nature of goods if they were deliberately ignorant of the goods' origin.

The instructions given by the court do not support this argument. Nothing in the deliberate-ignorance instruction mentioned 18 U.S.C. § 21 or hinted that the jury could find a "belief" that goods were stolen based on evidence of deliberate ignorance. Because we must assume that the jury followed the instructions as written, *see Mari,* 47 F.3d at 785-86, the argument is unavailing.

Ziyad Shalash separately argues that the evidence did not support a deliberate-ignorance instruction. *Mari,* however, forecloses this argument. In that case, we recognized that deliberate ignorance "applies when there is sufficient evidence to support a finding of deliberate ignorance beyond a reasonable doubt," then observed that if evidence did not support a verdict under a deliberate indifference the theory, the jury would ignore the instruction. 47 F.3d at 785. If the Shalashes are correct that the evidence does not support a deliberate ignorance theory,

"the error was harmless [] for the only way we can conclude that the deliberate ignorance instruction was harmful is if we assume that the jury applied the instruction contrary to its express terms." *Id.* at 786 (quotation omitted); *see also Griffin v. United States,* 502 U.S. 46, 59 (1991) (While jurors' "own intelligence and expertise" may not save them from making legal errors, "[q]uite the opposite is true [] when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence.") (emphasis omitted).

V.

The Shalashes also challenge the sufficiency of the evidence on a number of counts. They carry a heavy burden in doing so because we will affirm the convictions if "after viewing the evidence in the light most favorable to the prosecution . . . any rational trier of fact could find the elements of the crime beyond a reasonable doubt." *United States v. Villarce,* 323 F.3d 435, 438 (6th Cir. 2003) (quotation omitted).

A.

The Shalashes first challenge their RICO convictions. Count 1 charged the brothers with conspiring to violate RICO, 18 U.S.C. § 1962(d), and Count 2 charged them with conducting an enterprise "through a pattern of racketeering activity," 18 U.S.C. § 1962(c). Contrary to the Shalashes' arguments, the evidence supports the conclusion that Unity Wholesale Grocers and United Trading Company were RICO "enterprises" and that the Shalashes engaged in a "pattern of racketeering activity."

Proof of a RICO "enterprise" requires the Government to show: "(1) an ongoing organization with some sort of framework or superstructure for making and carrying out decisions; (2) that the members of the enterprise functioned as a continuing unit with established duties; and (3) that the enterprise was separate and distinct from the pattern of racketeering activity in which it engaged." *United States v. Chance,* 306 F.3d 356, 372 (6th Cir. 2002). Alfred Cornette, the former president of United Trading, explained the organization's decision-making structure and the defendants' duties. He testified that Big Man owned Unity Wholesale Grocers, Tareq (the oldest son) was second in charge, and Ziyad assumed control of United Trading after Cornette quit. The enterprise was also "separate and distinct" from the racketeering activity, because "[o]ut of tens of millions of dollars in sales . . . [and] accepting the jury's verdict at face value[,] the companies sold [only] several hundred thousand dollars in stolen merchandise." Ziyad Shalash Br. at 15. These legitimate sales support the conclusion that Unity Wholesale Grocers and United Trading Company maintained an existence "separate and distinct" from the fencing operation.

The Government also established a "pattern of racketeering activity," which requires "not only that at least two predicate acts occurred, but also a 'relationship between the predicates' and the 'threat of continuing activity[.]'" *United States v. Blandford,* 33 F.3d 685, 703 (6th Cir. 1994). The jury in this instance returned convictions on 13 of the charged predicate acts relating to the same fencing operation, all of which (as we explain below) the evidence supported.

B.

Tareq Shalash disputes the sufficiency of the evidence to support the convictions on Counts 4-6, which stem from Tareq's receipt of stolen infant formula. The substantive offense, 18 U.S.C. § 2314, requires proof of the following elements: "(1) transporting, or causing the transportation, (2) in interstate commerce, (3) of property valued at $5,000 or more, (4) with knowledge that it has been stolen, converted, or fraudulently taken from its rightful owner." *United States v. Monus,* 128 F.3d 376, 384 (6th Cir. 1997). The Government relied on 18 U.S.C. § 21 to satisfy the knowledge requirement by showing that law enforcement officials represented the goods as stolen and Tareq believed them.

The Government introduced considerable evidence showing the Shalashes established a "pipeline" of stolen infant formula moving from Cincinnati and Columbus, Ohio to Kentucky. Linda Khriss testified that she called Big Man and Ziyad to arrange a sale of infant formula; she told them that she acquired the infant formula from a thief; they nonetheless accepted the formula; and Tareq paid her in cash.

The Government also called several other participants in the "pipeline," who delivered the formula to Tareq. The Government's testimony showed that Mohammed Omran in Cincinnati ran a "side business" of collecting stolen goods and selling them to the Shalashes. Infant formula that police officers sold (and represented as stolen) to Adnan Jallaq in Count 4 ended up in Omran's hands, and police officers followed it to Tareq's warehouse, where he personally accepted the delivery at night. In Count 6, the police sold more formula to Jallaq, who again sold it to

Omran. Omran then made a second delivery to Tareq's warehouse, this time in a small Ford Ranger pick-up truck with a cover over the truck bed.

Officers in Columbus, Ohio represented the infant formula in Count 5 as stolen and sold it to Mustafa Shalash. Mustafa then sold it to Fayez Shalash – who was Big Man's agent in Columbus and who pleaded guilty to a stolen-goods conspiracy. Fayez later delivered the infant formula on November 1, 2000 at 8 p.m. to Tareq's warehouse.

In determining whether sufficient evidence shows that Tareq believed the goods he purchased from the Shalash associates in Ohio were stolen (Counts 4-6), the Government may rely on circumstantial proof to establish Tareq's state of mind. *See United States v. Scruggs,* 549 F.2d 1097, 1104 (6th Cir. 1977) ("It has long been recognized in this circuit and elsewhere that circumstantial evidence . . . [construed] in light of common experience can be sufficient to support a jury's determination that a defendant had guilty knowledge beyond a reasonable doubt."); *United States v. Werner,* 160 F.2d 438, 441-42 (2d Cir. 1947) (L.Hand, J.) ("The receivers of stolen goods almost never 'know' that they have been stolen, in the sense that they could testify to it in a court room. The business could not be so conducted, for those who sell the goods – the 'fences' – must keep up a more respectable front. . . . But that the jury must find that the receiver did more than infer the theft from the circumstances has never been demanded.").

The circumstantial evidence here shows that Tareq played a leading role in managing the Shalash operation, which repeatedly received stolen infant formula from Ohio. He was second in charge; he paid for the deliveries of

the formula from Ohio; he received two of the deliveries at night and received the other delivery from a pick-up truck; and he worked closely with his father Big Man and brother Ziyad, who each plainly knew the goods received from Ohio were represented as stolen. *See United States v. Warshawsky,* 20 F.3d 204, 209 n.2 (6th Cir. 1994) ("In assessing [the defendants'] knowledge that the parts were stolen, the jury could properly consider the fact that the defendants were both brothers and business partners, which raises a permissible inference that they might share information concerning their business activities."). Given the amount of stolen goods the Shalashes were selling and Tareq's knowledge of these other transactions, he can hardly claim to be an innocent about the general nature of their business or the specific source of the infant formula. *See* JA 1418 (undercover officer Paul Sherman, who sold goods represented as stolen, asked Tareq if he was a police officer, and Tareq responded: "If I were police, you would have been gone a long time ago or I woulda' been gone [a] long time ago."). Keeping in mind that "we must consider the evidence as a whole, and not as individual pieces, and remember[ing] that the jury is entitled to base its decision on reasonable inferences from circumstantial evidence," *United States v. Rahman,* 189 F.3d 88, 122-23 (2d Cir. 1999) (citation omitted), a rational juror could conclude that Tareq believed the goods he received in Counts 4-6 were stolen. *See United States v. Langley,* 466 F.2d 27, 32 (6th Cir. 1972) ("That other inferences might have been drawn [from the evidence] does not mandate reversal.").

C.

Tareq next disputes the sufficiency of the evidence for Counts 14 and 15, which stem from two trailers stolen by

Charlotte Harris and brokered by Sam Shalali, a Shalash business acquaintance. The substantive offense for these counts, 18 U.S.C. § 659, punishes "[w]hoever [] steals . . . from any . . . motortruck, or other vehicle, or from . . . any storage facility . . . any goods or chattels moving as or which are a part of or which constitute an interstate . . . shipment of freight . . . ; or [w]hoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen."

Ample evidence shows that Tareq knew the trailers and goods were stolen. Tareq dealt directly with Sam Shalali, who knew the goods were stolen and who received payment from Tareq for the goods. Charlotte Harris delivered the first load (Count 14) to what appeared to be a vacant warehouse with no employees in it. When Harris asked for assistance in disposing with the empty stolen trailer, Shalali said she could not leave it at the Shalashes' warehouse. Tareq also paid a suspiciously low price for the goods in Count 14. Cornette earlier warned Tareq about the low price he was paying for some of his goods, and Cornette further recognized that "[t]he other products that were [in the Shalash warehouses] were very close margins. Probably 10 percent or less." JA 402. In the light of this testimony, a jury could infer that Tareq knew the goods in Count 14 were stolen when he paid only 75% of their market value. *See United States v. Cook,* 432 F.2d 915, 916 (6th Cir. 1970) (evidence proving that the defendant "bought [the goods] for a price so low as to warrant grave doubt about the transaction" supported stolen-goods conviction); *see also United States v. Smith,* 502 F.2d 1250, 1254 (5th Cir. 1974) (evidence that defendant "was directly involved in selling engines [for 67% of] their retail value" supported stolen-goods conviction); *Melson v. United*

States, 207 F.2d 558 (4th Cir. 1953) (selling eggs by the dozen at 61-80% of their value supported inference that defendant knew eggs were stolen). And when Shalali delivered another stolen load (Count 15) with Charlotte Harris on New Years' Eve, and Tareq paid only 61% of the market value for the goods, a permissible inference arose that Tareq knew these goods and this trailer also were stolen.

D.

Tareq next challenges his convictions on Counts 19 and 20, which also involve violations of 18 U.S.C. § 659, and which stem from Tareq's possession of two stolen trailers filled with consumer goods. Tareq again argues that the Government did not produce sufficient evidence that he knew the goods were stolen. The police, however, found a non-negotiable bill of lading in Tareq's office for the load covered by Count 20. The document required "Schneider Dedicated" to transport the trailer from the Kimberly Clark Corporation in South Carolina to a Sam's Distribution Center in Arkansas. Because Tareq possessed a bill of lading showing that the trailer belonged to someone else, a jury could fairly infer that he knew the goods were stolen. *See United States v. Thuna,* 786 F.2d 437, 438 (1st Cir. 1986) ("If [the defendant] did have the bill of lading, he certainly would have known that the [goods] were stolen, since that document listed the intended recipient of the shipment."); *see also United States v. Jewell,* 893 F.2d 193, 194 (8th Cir. 1990) (evidence supported conviction under 18 U.S.C. § 659 because defendant "was present when the bills of lading were examined"). While the police found no similar document for the load covered by Count 19, "an inference of guilty knowledge

may be drawn from the fact of unexplained possession of stolen goods." *Barnes v. United States,* 412 U.S. 837, 843 (1973); *see United States v. Johnson,* 741 F.2d 854, 857-58 (6th Cir. 1984); *Pearson v. United States,* 192 F.2d 681, 689 (6th Cir. 1951) ("[P]ossession must be accounted for in a straightforward, truthful way, and unless the jury finds the explanation reasonable and satisfactory, they may be warranted in returning a verdict of guilty."). That inference is particularly appropriate when a person is found to be in possession of stolen property on repeated occasions, which is assuredly the case here. *See* Model Penal Code, §§ 223.6(2)(a) & (b) ("knowledge or belief is presumed in the case of a dealer [in the business of buying and selling goods] who . . . is found in possession or control of property stolen from two or more persons on separate occasions; or [] has received stolen property in another transaction within the year preceding the transaction charged").

E.

Tareq next challenges his convictions on Counts 17, 18 and 22, involving further violations of 18 U.S.C. § 2314, which prohibits the interstate transportation of stolen goods valued at $5,000 or more with knowledge that the goods were stolen. Paul Sherman, a Memphis police officer, posed as truck driver Steve Worley and delivered the following loads from Tennessee to Tareq in Kentucky: (1) cereal and hair care products on April 12, 2001 (Count 17); (2) skin care and various other products on April 25, 2001 (Count 18); and (3) Motrin on May 15, 2001 (Count 22). Because these counts involved an undercover sting operation, the Government relied on 18 U.S.C. § 21 to show belief that the goods were stolen.

Sherman represented his goods as stolen to Tareq, and Tareq's actions show that he believed the goods were stolen. On April 11, 2001, the day before Sherman delivered the goods charged in Count 17, he told Tareq in a recorded phone conversation that he "grabbed it over in . . . West Memphis, and [] I've got to get it up there." JA 1333. He also told Tareq "I don't have no bills [of lading] for it or nothin'." JA 1334. When Sherman actually delivered the load, he told Tareq: "oh, man, we got a Kroger place up there you can steal this shit all day long, I'll get it and gone." JA 1343. Tareq expressly told Sherman: "Don't tell me you[r] business." JA 1345. When Sherman said "[t]here's a big parkin' lot over there. You can get anything you want," Tareq replied, "I don't want to hear about it." JA 1349. On the final delivery (May 15, 2001), Tareq asked Sherman to sign a document warranting that Sherman did not steal the goods in that shipment "for my protection [][i]n case they come down on you." JA 1418. Sherman then asked Tareq if he was a police officer, and Tareq responded: "If I were police, you would have been gone a long time ago or I woulda' been gone [a] long time ago." *Id.* "[Y]ou scared me [the] other day," Tareq added. JA 1420. "You tell me, this is my stuff, this is, you know, don't cost me nothing. You shouldn't be telling me shit like that." These conversations permissibly allowed the jury to find that Sherman represented the goods as stolen prior to delivery and Tareq believed him.

Tareq counters that 18 U.S.C. § 21 requires that an "official representation" must be a "presentation of fact," and Sherman never made a "presentation of fact" that the goods were stolen. Tareq Shalash Br. at 48. Tareq is correct, however, only in the sense that Sherman did not say the word "stolen" every time he delivered goods.

Sherman made numerous representations of fact, beginning with a taped phone conversation the day before his first delivery (Count 17), relating to how he obtained the goods. In using phrases like "grabbed it," JA 1333, "I can't keep it around long," JA 1334, "I gotta get outta here," JA 1335, "I don't have no bills [of lading] for it or nothin'," JA 1334, "you can steal this shit all day long, I'll get it and gone," JA 1343, "you just snatch it [and] go," JA 1399, and "you can't tell nobody where you get it from," JA 1345, Sherman gave a jury ample reason to conclude that he represented his goods as stolen. Indeed, at the end of a recorded conversation with Tareq on May 15, 2001, Sherman talked about being questioned by authorities if he had a Wal-Mart trailer attached to a non-Wal-Mart tractor, after which Tareq responded "[b]ut you better look at it so it won't be no clothes or other bullshit." JA 1450. The suggested transportation of goods in a Wal-Mart trailer by Sherman, who was not a Wal-Mart employee, is itself indicative that Sherman was selling stolen goods, and Tareq's comment that Sherman needed to look in the trailer to make sure he had consumer goods, not stolen clothes, confirms that Tareq believed he was dealing with a thief.

Tareq also challenges the value of the goods charged in Count 18. *See* 18 U.S.C. § 2314 (requiring the stolen goods to have a "value of $5,000 or more"). This load contained hand lotion, ointment, cough drops, nasal breathing strips, infant formula and mouth wash. The indictment indicates the correct date of the shipment (April 25, 2001), but mentions only "skin care products" valued at $5,000 or more. Tareq does not dispute the overall value of the load – $37,660 – which is more than sufficient to meet the statutory amount. To the extent

Tareq argues that a variance occurred between the proof at trial and the allegations in the indictment – an argument that is anything but clear from his brief – reversal is warranted only when the variance affects the defendant's substantial rights, *see United States v. Manning,* 142 F.3d 336, 339 (6th Cir. 1998), which did not happen here.

F.

Tareq next contests the conspiracy charge against him (Count 21) related to the May 15, 2001 delivery of Motrin. In order to establish a conspiracy, the Government must prove: "(1) that the conspiracy was willfully formed and was existing at or about the time alleged; (2) that the defendant willfully became a member of the conspiracy; (3) that one of the conspirators knowingly committed an overt act; and (4) that the overt act was knowingly done in furtherance of the conspiracy." *United States v. McGahee,* 257 F.3d 520, 530 (6th Cir. 2001). During the April 12, 2001 delivery of stolen goods, Sherman indicated that he could steal a trailer of Motrin and asked Tareq if he was interested, to which Tareq responded "[t]hat's my number one item," and agreed to purchase it from Sherman. JA 1345. Sherman then said: "You can't tell nobody where you get it from," to which Tareq responded: "That's right. I don't want to know." *Id.* On May 15, 2001, Sherman delivered the Motrin.

Tareq argues that the Government did not allege or prove that he agreed with anyone other than an undercover police officer. *See United States v. Nunez,* 889 F.2d 1564, 1569 (6th Cir. 1989) ("It is settled that proof of an agreement between a defendant and a government agent or informer will not support a conspiracy conviction.")

(quotation omitted). The indictment, however, alleges that Tareq "conspired and agreed with other persons *known and unknown* to the Grand Jury." JA 104 (emphasis added). The Government need not specifically identify the other conspirators, *United States v. Rey,* 923 F.2d 1217, 1222 (6th Cir. 1991), and the evidence supports a finding that Tareq operated the family business with Big Man, Ziyad and others by routinely purchasing stolen goods from truck drivers and shoplifters, *see United States v. Bavers,* 787 F.2d 1022, 1026 (6th Cir. 1985) ("A conspiracy may be inferred from circumstantial evidence that can reasonably be interpreted as participation in the common plan."). Ziyad was often present and helped unload Sherman's goods. The youngest Shalash brother, Anas, was also present for some of Sherman's deliveries and helped Tareq negotiate the price for some of Sherman's goods. Although the record does not reveal a specific discussion between Tareq and others concerning the Motrin delivery, "[t]he government need not prove . . . that each [conspirator] knew the full extent of the conspiracy, because such facts may be inferred from the interdependence of the enterprise." *United States v. Rogers,* 118 F.3d 466, 478 (6th Cir. 1997); *see also United States v. Lloyd,* 10 F.3d 1197, 1211 (6th Cir. 1993) ("[T]he circumstantial and direct evidence of the ongoing involvement between [the defendants], and of their illicit activities, was sufficient to allow a reasonable jury to conclude that a mutual understanding existed between them that they would together violate the drug laws with which they were charged."). Construing the evidence most favorably to the Government, a rational juror could conclude that Tareq agreed with other persons to cause the interstate transport of the Motrin.

G.

Ziyad contests his individual conviction for violating 18 U.S.C. § 2315 (Count 23), which punishes "[w]hoever receives, possesses, conceals, stores, barters, sells, or disposes of any goods . . . of the value of $5,000 or more, which have crossed a State or United States boundary after being stolen . . . knowing the same to have been stolen." Ziyad claims that the Government failed to satisfy the "$5,000 or more" requirement.

The record is otherwise. Misty Washabaugh testified that she supervised an interstate shoplifting ring. She employed a number of shoplifters, transported the shoplifters to other States, collected their shoplifted goods and shipped the goods back to Kentucky. She sold "several thousand" dollars of goods to Ziyad, including razor blades. The evidence also shows that the Shalashes generally paid one-half of the wholesale price for the razor blades. If Washabaugh's "several thousand" dollars amounted to something less than $5,000, the evidence indicating that the Shalashes paid approximately one-half of the wholesale price doubles the "several thousand" dollar total. *See United States v. Perry,* 638 F.2d 862, 867-68 (5th Cir. 1981) (For purposes of 18 U.S.C. § 2314, "the market value of [stolen] goods . . . should be valued at the actual market value . . . *at which that victim offered the goods for sale.*") (emphasis added); *cf. Warshawsky,* 20 F.3d at 213 (approving *Perry* for purposes of calculating the value of stolen property under U.S.S.G. § 2B1.1). On this record, adequate evidence supported the jury's verdict.

H.

The Shalash brothers next contest their conviction under 18 U.S.C. § 1956(h) (Count 26), which prohibits individuals from conspiring to commit money-laundering in violation of 18 U.S.C. § 1956 or § 1957. Most relevant for our purposes, a violation of 18 U.S.C. § 1956(a)(1)(B)(i) requires proof of: "(1) use of funds that are proceeds of unlawful activity; (2) knowledge that the funds are proceeds of unlawful activity; and (3) conduct[ing] or attempt[ing] to conduct a financial transaction, knowing that the transaction is designed in whole or in part to disguise the nature, location, source, ownership or control of the proceeds." *Prince,* 214 F.3d at 747.

The evidence sufficed to convict the Shalashes under this count. A jury could infer that the Shalashes willfully formed the conspiracy based on the day-to-day conduct of their business. *See United States v. Searan,* 259 F.3d 434, 442 (6th Cir. 2001) ("The agreement, intent to join it, and participation can all be inferred from acts done with a common purpose."). The Shalashes wrote checks to their sellers for stolen goods, then promptly cashed the checks with money they kept at their warehouses. When one witness questioned this practice, Tareq explained "that it was important as a business to show money going through your bank account." JA 559. In reference to the checks he wrote for sellers, Tareq told another witness, "I got to prove I'm buying and selling. People who [] make it up there [are] the people who work this way." JA 1444. Within days of his first indictment, Ziyad wrote a $715,000 check on United Trading Company's account to the younger Shalash brother, Anas. Anas converted this check to a cashier's check which, at the time of trial, he had yet to cash. The Shalashes also transferred several hundred

thousand dollars from their business accounts to Tareq's individual Paine Webber investment accounts. Together, these facts support a finding that the brothers sought to conceal the nature of their wealth and conspired to violate the money-laundering statutes. *See United States v. Crossley,* 224 F.3d 847, 856 (6th Cir. 2000) ("Circumstantial evidence which a reasonable person could interpret as showing participation in a common plan may be used to establish the existence of a conspiracy agreement.").

The Government also proved that when Ziyad wrote the $715,000 check from United Trading Company's account to Anas shortly after his indictment, he knowingly committed an overt act in furtherance of the conspiracy. A rational jury could find that the check written to Anas involved proceeds of unlawful activity based on the evidence indicating that the Shalashes routinely funded their accounts through stolen goods transactions. Ziyad actively participated in the Shalashes' fencing operations and supervised United Trading Company, which supports the conclusion that he knew the funds in United Trading Company's accounts involved proceeds of illegal activity. Finally, diverting money from the family business accounts (which the Government ultimately froze) to an unindicted relative allowed the jury also to find that Ziyad knowingly wrote the check to conceal the "nature, location, source, ownership or control of the proceeds." *Prince,* 214 F.3d at 747; *see United States v. McGauley,* 279 F.3d 62, 70 (1st Cir. 2002) (when the defendant "transferred $243,087.42 out of her existing bank accounts into new ones" after the search of her home, "a reasonable jury could have found . . . that [her] purpose was 'to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of [her crime]' ").

The Shalashes argue that the Government did not prove "that the money involved in the listed transactions represented the proceeds of the stolen property offenses," Ziyad Shalash Br. at 14, because the money received from selling stolen property represented only a small portion of the legitimate profits the Shalashes made. The Shalashes essentially argue that the Government must trace *all* of the money used in the money-laundering acts to the sale of stolen goods. Commingling funds derived from illegal activity with funds derived from legitimate transactions, however, satisfies the requirement under 18 U.S.C. § 1956(a)(1) that the transaction using the commingled funds involves proceeds from unlawful activity. *See United States v. Bencs,* 28 F.3d 555, 562 (6th Cir. 1994) ("We do not read Congress's use of the word 'involve' as imposing the requirement that the government trace the origin of all funds deposited into a bank account to determine exactly which funds were used for what transaction.") (quotation omitted).

Nor does *United States v. McDougald,* 990 F.2d 259 (6th Cir. 1993), alter this conclusion. There, we reversed a money-laundering conviction not because the Government failed to trace all of the laundered money to unlawful activity, but because the Government produced no evidence that *any* of the money came from unlawful activity. *Id.* at 261-62. The evidence here shows that criminal activity was part and parcel of the Shalash business and fully supports the conclusion that at least some of the money used in the overt acts originated from unlawful activity.

VI.

For the foregoing reasons, we affirm.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CRIMINAL ACTION NO. 01-93-KSF

UNITED STATES OF AMERICA

PLAINTIFF

V. ORDER

(Filed Dec. 5, 2002)

TAREQ SHALASH, *et. al.*

DEFENDANTS

* * * * * * * * * * * * *

Before the Court is defendants' joint motion for judgment of acquittal or, in the alternative for a new trial. [DE #323].

The defendants first challenge the sufficiency of the evidence in regards to Count 18, alleging that pursuant to 18 U.S.C. § 2314, there is insufficient evidence that the stolen goods in question had a value of $5,000 or more. The defendants' argument is without merit because "after viewing the evidence in the light most favorable to the prosecution, [a] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Griffith,* 17 F.3d 865, 872 (6th Cir. 1994) (citing *Jackson v. Virginia,* 443 U.S. 307, 319 (1979)). As an initial matter, the defendants acknowledge that:

> [c]ount 18 rests on the April 25, 2001 delivery to Unity Wholesale Grocery by Detective Paul Sherman, posing as truck driver Steve Worley. The delivery included several products: Enfamil infant formula, Listerine mouthwash, Halls

> cough drops, 'clear passage' nasal strips, A & D ointment, and Lubriderm hand lotion. (Citations omitted).

The indictment specifies "skin care products, valued in excess of $5,000." The defendants have failed to argue that the language of the indictment was insufficient to put them on notice that the above items would be offered as proof. Moreover, the defendants have not cited any authority requiring the indictment to specify that the stolen products were "infant care products," "mouth care products," "nasal care products" or the like. The wholesale value of the Lubriderm lotion was $2,516, and this value along with the quantity of the other items and the evidence pertaining to their value renders the Court unable to conclude that a rational juror would be precluded from finding that the jurisdictional amount was met.

Tareq Shalash next argues that the government offered insufficient evidence to show a criminal agreement concerning the Count 21 conspiracy charge to receive and transport stolen Motrin in interstate commerce. The Sixth Circuit has upheld conspiracy counts including unnamed persons. *See, e.g., United States v. Piccolo,* 723 F.2d 1234, 1237-39 (6th Cir. 1983) (en banc). Based upon the totality of the evidence, a rational jury could find that Tareq negotiated this load within the context of an ongoing conspiracy and that this "subconspiracy" was a joint effort involving Ziyad Shalash, Anas Shalash, and/or other "business associates."

Finally, defendant Ziyad Shalash argues for a judgment of acquittal on Count 23 for various reasons, including the government's alleged failure to show that he received or possessed the goods on the specified dates; the failure to show that the goods had a value of $5,000 or

more; that the goods did not travel in interstate commerce after being stolen. Based upon Misty Washabaugh's testimony alone, a reasonable jury could find that the goods had a retail value of over $5,000. The Jon Washabaugh entries would permit a reasonable jury to find that the transactions occurred in the relevant time frame. Moreover, the evidence including the testimony and proof of mailings from out of state and the government's printout permit the jury to conclude ttat more than $5,000 of the goods were purchased and traveled in interstate commerce.

The defendants' motion for a new trial based upon alleged prejudice due to the mention of their Arabic ethnic origin, and September 11 is not well taken. The fact that the trial concluded near in time to the one year anniversary of the September 11 tragedy is through no fault of the government. The government was prepared to try the case early on, but the trial was delayed due to discovery extensions granted at the defendant's request.[1]

The Court was particularly vigilant during the trial to guard against any inappropriate references that could tie the defendants to any anti-middle eastern sentiment. Clearly, the government's case was a methodical presentation of evidence and could not have reasonably injected ethnic prejudice into the case. The references to the "Arab" or "Middle Eastern" backgrounds of the defendants and customers was proper for identification purposes. In addition, the evidence indicating that the defendants

[1] Undoubtedly, if the trial had occurred sooner rather than later, the defendants would attempt to latch onto the close proximity to the actual September 11 tragedy as overly prejudicial. This transparent attempt to "win either way" is not well taken.

spoke in Arabic at times was relevant to show an intent to hide their business dealings and was presented in that context. The opening statement reference to "kinds of people" selling stolen property related not to ethnic background, but to transient, vagabond types, represented by a spectrum of ethnic backgrounds as evidenced by the witnesses involved in illegal transactions with the defendants.

Turning to the closing argument, the government did not improperly inject "class bias" or cajole the jury to reach a guilty verdict regardless of the evidence due to their civic duty. The closing argument properly emphasized the wrongful nature of ill-gotten gains and that the jury has the responsibility to rid the community of those found to be violating the law. The prosecution repeated that its work of presenting the evidence was complete, and that the jury had the opportunity and responsibility to take action. The closing argument is allowed to be an "argument" and the government's argument in this case did not in any way invite the jury to act contrary to law. *See, e.g., United States v. Bailey,* 123 F.3d 1381, 1402 (11th Cir. 1997); *Waldrop v. Thigpen,* 857 F. Supp. 872, 927 (N.D. Ala. 1994). In addition, the reference to "other crimes" referred to the pattern of ongoing activity indicative of the RICO prosecution and was not an attempt to refer to other crimes not in evidence.

Accordingly, the Court being fully advised, hereby ORDERS that the defendants' motion for judgment of acquittal or in the alternative for a new trial [DE #323] is DENIED.

This 5 day of December, 2002

/s/ Karl S. Forester
KARL S. FORESTER,
CHIEF JUDGE

Nos. 03-5037/5028/5210/5211

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. TAREQ SHALASH AND ZIYAD SHALASH, Defendants-Appellants.	)	ORDER (Filed Oct. 18, 2004)

BEFORE: SUHRHEINRICH and GIBBONS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active* judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk